88-1539

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

UNITED STATES SUPREME COURT

OCTOBER 1988

HOMER BAKER AND LOTTIE RUTH BAKER, HUSBAND AND WIFE, PETITIONERS,

VS.

ZELMA PIERCE, EXECUTRIX OF THE ESTATE OF ALBERT BAKER, DECEASED; ZELMA PIERCE, HEIR AT LAW OF ALBERT BAKER, DECEASED; OMA BAKER, WIDOW; OVA BAKER AND ROSIE BAKER, HUSBAND AND WIFE; THELMA HIBBS AND J.W. HIBBS, HUSBAND AND WIFE; THELMA HIBBS AND J.W. HIBBS, HUSBAND AND WIFE; JEAN CARLISLE AND NORMAN CARLISLE, HUSBAND AND WIFE; RAY BAKER AND JACKIE BAKER, HUSBAND AND WIFE; JAMES H. BAXTER, HEIRS AT LAW OF ALBERT BAKER, DECEASED; CONTINENTAL COAL CO., INC.; SHAMROCK COAL CO., INC.; AND JOHN V. JONES AND IVA M. JONES, HUSBAND AND WIFE, RESPONDENTS.

ON APPEAL FROM THE 6TH CIRCUIT COURT OF APPEALS;
ON WRIT OF CERTIORARI TO THE U.S. SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JOE T. ROBERTS
405 South Main Street
P.O. Box 176
London, Kentucky 40741-0176
TELEPHONE: (606) 878-6111
ATTORNEY FOR PETITIONERS

HON. ELMER CUNNAGIN, 4th and Main Street, London, Kentucky 40741

HON. ROBERT L. MILBY, 120 North Main Street, London, Kentucky 40741

The questions presented for review in the United States Supreme Court are as follows:

WHETHER THE 6TH CIRCUIT COURT OF APPEALS ERRORED IN AFFIRMING THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY WHEN SAID DISTRICT COURT SET ASIDE A DEED TO THE PETITIONERS HEREIN OF THEIR ONE-HALF (½) UNDIVIDED INTEREST, WITH SAID DEED BEING DATED JUNE 15, 1979, IN WHICH THE EXECUTRIX OF THE ESTATE OF ALBERT BAKER, DECEASED, HAD POWER TO SELL SAID PROPERTY IN QUESTION TO THE PETITIONERS?

THE 6TH CIRCUIT COURT OF APPEALS ERRORED IN THEIR CONCLUSION THAT ONE OF THE PETITIONERS, HOMER BAKER, ONCE OWNED THE PROPERTY IN QUESTION AND CONVEYED IT TO HIS FATHER, ALBERT BAKER, IN 1946, WHEN THE PETITION FOR REHEARING/RECONSIDERATION FILED WITH THE 6TH CIRCUIT CLEARLY SHOWS THAT IN APRIL OF 1946, HOMER BAKER WAS

ONLY TEN (10) YEARS OF AGE AND COULD NOT, UNDER KENTUCKY LAW, TRANSFER A VALID DEED TO HIS FATHER, ALBERT BAKER.

WHETHER A BONA FIDE PURCHASER FOR VALUE CAN HAVE AN INTEREST IN REAL ESTATE SET ASIDE WITHOUT EVIDENCE OF WRONG DOING ON BEHALF OF EITHER THE GRANTOR OR GRANTEE?

WHETHER THE PETITIONERS, HOMER AND LOTTIE RUTH BAKER, ACTED IN GOOD FAITH AND WHETHER THEY HAD ACTUAL OR CONSTRUCTIVE NOTICE THAT THE SPECIFIC PROPERTY THAT WAS PURCHASED WAS THE SUBJECT OF LITIGATION?

WHETHER THE INTEREST OF THE PETITIONERS IN THE PROPERTY IN QUESTION SHOULD BE SET ASIDE UNDER THE FACTS AS SHOWN BY THE RECORD HEREIN?

WHETHER THE RECORD REVEALS THAT THE PETITIONER, HOMER BAKER, KNEW THAT THE REAL ESTATE IN QUESTION WAS THE SUBJECT OF LITIGATION IN JUNE OF 1979, WHEN HE HAD ONLY ATTENDED A BRIEF DEPOSITION IN

1976?

WHETHER KNOWLEDGE AND WRONG DOING MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE?

WHETHER THE THIRD PARTY COMPLAINT STATED A CAUSE OF ACTION THAT WAS SUFFICIENTLY PROVEN?.

WHETHER THE THIRD PARTY PLAINTIFFS, IN THE DISTRICT COURT BELOW, WERE GUILTY OF LACHES?

A list of all parties to the proceedings in the 6th Circuit Court of Appeals and whose Judgment is sought to be reviewed herein, is contained in the caption of the Petition for Writ of Certiorari.

TABLE OF CONTENTS

ITEM	PAGE(S)
QUESTIONS PRESENTED FOR REVIEW.....	i - iii
LIST OF PARTIES TO PRECEDINGS.....	iii
TABLE OF CITATIONS.....	v
INTRODUCTION.....	1 - 3
STATEMENT OF THE CASE.....	3 - 13
ARGUMENT FOR ALLOWANCE OF WRIT.....	13 - 28
CONCLUSION.....	28
CERTIFICATION.....	29

APPENDIX:

MAGISTRATE'S REPORT AND RECOMMENDATION.....	1 - 21
JUDGE'S ORDER.....	22 - 25
6TH CIRCUIT REMAND.....	26 - 41
MEMORANDUM OF U.S. DISTRICT....	42 - 45
6TH CIRCUIT RULING.....	46 - 58
ORDER OVERRULING REHEARING.....	59
PETITION FOR REHARING/ RECONSIDERATION.....	60 - 103

TABLE OF CITATIONS

CASE OR STATUTE	PAGE(S)
Title 28, U.S.C. §1254(1)	2
K.R.S. 382.440	2
K.R.S. 382.440(1)	15
Isaacs' Adm. et al, v. Hignite, et al, 95 S.W. 2d, 1116 (Ky. 1936)	20
Buckner v. Buckner, et al, 215 S.W. 420, (Ky. 1919)	20
Consolidated Coal Co., v. King, 244 S.W. 303 (Ky. 1922)	22
Cecil v. Cecil Executrix, 215 S.W. 794	22
Fed. R. Civ. P. 52.1	25
United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)	25
Rule 52(a)	25

There are no official or unofficial reports cited to the Opinion of the 6th Circuit Court of Appeals and the United States District Corut for the Eastern District of Kentucky but both Opinions are attached in the Appendix herein.

The grounds on which the jurisdiction of the U.S. Supremen Court is invoked, is, of course, this Petition from the 6th Circuit Court of Appeals and the following is shown:

(i) The date of the Judgment of the United States Court of Appeals for the 6th Circuit sought to be reviewed is dated and entered on December 28, 1988.

(ii) The Petition for Rehearing was denied and filed of record on January 31, 1989.

(iii) There is no cross-petition that has been filed as of this date.

(iv) The statutory provision believed to confer on the United States

Supreme Court jurisdiction to review the Judgment of the U.S. 6th Circuit Court of Appeals by Writ of Certiorari is Title 28, U.S.C. §1254(1).

The only statute involved herein, which would have any bearing whatsoever is Kentucky Revised Statutes 382.440, same is quoted as follows:

> "No action, cross-action, counter claim, or any other proceedings, except actions for forceable detainer or forceable entry or detainer commenced or filed in any court of this state, in which the title to, or the possession or use of, or any lien, tax, accessment or charge on real property, or any interest therein is in any manner effected or involved nor any order nor judgment therein, nor any sale or other proceedings, nor any proceedings in, nor judgment or decree rendered in a district court of the United States, shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, or encumbrancer of such real property or interest for value and without notice thereof, except from the time there is filed, in the office of the county clerk, of the county in which such real property or the

greater part thereof lies, a memorandum stating...."

STATEMENT OF THE CASE

The facts relevent to the issues presented for review are setforth as follows:

Albert Baker, deceased, died testate, owning all the property that was the original subject of litigation in the U.S. District Court and his date of death is November 19, 1972, and his Last Will and Testament was probated according the law.

Albert Baker was the father of the original Plaintiff, Zelma Pierce, who was appointed as Executrix of his Last Will and Testament and also the father of most of the other Defendants, as well as the father of the Petitioner herein, Homer Baker.

At the time of death, Albert Baker owned several tracts of land in Clay County, Kentucky and it is undisputed that his

Executrix had the power to sell the property herein but could not sell the homeplace, which is not in dispute.

On September 24, 1974, the Petitioner, Homer Baker, deeded his interest that he had inherited from Albert Baker to his sister, Zelma Pierce Reidling, and his sister, Barbara Baxter, and therefore he was eliminated from any interest in the properties that had belonged to his deceased father, Albert Baker.

On November 6, 1974, the Executrix filed suit in the U.S. District Court for the Eastern District of Kentucky, at London, against all the named devisees, with the exclusion of the Petitioner, Homer Baker, who had no interest in the property and the complaint alleged that the property could not be divided without materially impairing its value and requested the U.S. District Court to enter Judgment ordering the property sold, which included

the property in question herein, in which the Executrix had a right to sell under the power of the will of Albert Baker. It is uncontested that the mineral rights under the property did not belong to Albert Baker at the time of his death and, in fact, belonged to a third party.

On July 15, 1979, the Executrix deeded the property involved herein, under her power as Executrix, to Homer Baker and John V. Jones by deed of general warranty, with the exception that no warranty was made with reference to title to the minerals under the property and on March 13, 1980, the Executrix made a motion to withdraw a portion of her complaint with reference to the property that she had deeded over to the Petitioner herein, Homer Baker and John V. Jones.

The matter had been pending in the U.S. District Court since November 6, 1974, with the deed being made in July

of 1979, and the Petitioner, Homer Baker and one of the Respondents herein, John V. Jones, were not brought into the suit until a Third Party Complaint was filed on November 5, 1983.

The Executrix has testified, by way of deposition on at least two (2) occassions in the court below that she had power to sell all of the real estate wheresoever situated except the "home place", and this fact had been undisputed throughout the record herein and the conveyance she made to Homer Baker and John V. Jones did not include the "home place".

The purchase price the Executrix received was $36,630.00 and that immediately prior to selling the property to the Petitioner herein, and Jones, the Executrix had received an offer of $36,500.00 by private individuals and an offer of $31,200.00 from the U.S. Forest Service.

The Executrix had received instructions from the estate's attorney that she could sell the property in question and based upon this advise and further, due to the fact that Homer Baker was her brother, she decided to sell the property to the Petitioner, Homer Baker.

The deposition of the Executrix, Zelma Pierce (Reidling) was taken for the first time on June 11, 1976, with reference to the Complaint that she had filed in the U.S. District Court to have the property sold and she, in essence, testified as follows:

> "Q. 27. Now, who was the decedent?
> A. He was our father.
> Q. 28. Your father and the father of all the defendants' heirs?
> A. Yes.
> Q. 29. Now, did he die a resident of Madison County, Kentucky on or about November 19, 1972?
> A. He did.
> Q. 30. And did he leave a will devising his real estate?
> A. He did."

On page 8 of said deposition beginning with question 37, is quoted as follows:

> "Q. 37. Mrs. Reidling, the defendant, Oma Baker, was she the widow of Albert Baker, at the time of his death?
> A. Yes, she was.
> Q. 38. And did she, to your knowledge renounce the will of Albert Baker and elect to recieve her dower under the laws under the State of Kentucky?
> A. She did.
> Q. 39. The interest of Homer Baker, who is one of the heirs named in the will of Albert Baker was conveyed by Jerry D. Truitt, Trustee in Bankruptcy to you and the defendant, Barbara Baxter, is that correct?
> A. That's right.
> Q. 40. By deed dated September 24, 1974?
> A. Right."

On page 9, question 42, setforth certain grantors, dates of deeds and the deed book and page were said deeds were recorded which continues over from page 9, through the bottom half of page 10, in which Mrs. Reidling made a part of her testimony and marked them as exhibits.

The Petitioner herein, Homer Baker, testified by way of deposition on February 20, 1984, that his sister, Barbara Baxter, had called him and advised that the Executrix, Zelma Pierce Reidling was about to sell the property of Albert Baker and wanted to know whether he would want to buy the property and subsequently he called the Executrix and told her he would like to buy the property if at all possible and was advised to call the attorney for the estate and discuss it with him. The Executrix also told the Petitioner herein, Homer Baker, that they were negotiating with Manuel and Lucy Smith and also the Forest Service on selling the property and therefore he got his friend, John V. Jones, one of the Respondents herein, to go in with him on the property and they bought it, after talking to the estate attorney and was advised by the attorney that it would be legal for the Executrix

to sell the property to him but the mineral rights were in question in that someone else was claiming the minerals and the Petitioner, Homer Baker, went on to state that he had learned of surface rights some time in 1980 or 1981, when a representative of a coal company called him and wanted to lease the surface rights to the property in question.

Homer Baker went on to testify that he knew a suit had been filed to sell the home place but did not know the suit involved the property that he had purchased in 1979, which is the same property that in question herein.

The Petitioners' co-owner, John V. Jones, also testified by way of deposition on February 20, 1984, and stated that he had only learned about the law suit approximately four (4) months prior to the date of his testimony.

Under the above factual situation,

the district court set aside the 1979 deed to the Petitioner, Homer Baker and the Respondent, John V. Jones, and the appeal was taken to the 6th Circuit Court of Appeals and said 6th Circuit held the following:

> "(1) If the grantees are bona fide purchasers without notice of any impairment of the power of sale the deed was effective to pass title to the property.
> (2) If, however, the grantees were not acting in good faith, or,
> (3) Had actual or constructive notice that the property was the subject of litigation, the transaction may be set aside".

The 6th Circuit, on the first appeal, after the above holding, remanded the case to the district court and certain motions were made and memorandums filed with the district court but no further proof being taken, the district court, by Order and Memorandum dated December 10, 1987, held the following:

> "The sale of one-half (½) unidivided interest in tracts

> 3-8 (as described in this court's Order of October 3, 1985) of Albert Baker's estate to Homer Baker on June 15, 1979, is set aside as Homer Baker knew the property was the subject of litigation. The sale of one-half (½) undivided interest in tracts 3-8 of Albert Baker's estate to John Jones on June 15, 1979, is effective, as Jones had no notice of impairment to the title."
>
> (District Court docket sheet, item number 177)

Subsequent to the above ruling for the second time, by the U.S. District Court, the Petitioner herein, filed a Motion to Alter, Amend or Vacate the December 10, 1987, Order and Memorandum of the U.S. District Court, which effected his one-half (½) undivided interest in the property in question and filed an Affidavit of Homer Baker, the Petitioner herein and John V. Jones, and the Court overruled said Motion and this matter was then appealed to the 6th Circuit Court of Appeals for the second time and on December 28, 1988, the 6th Circuit Court of Appeals rendered

its Opinion and Judgment affirming the U.S. District Court's ruling and subsequent thereto the Petitioner, Homer Baker, filed a Petition for Reconsideration/Rehearing which was overruled on January 31, 1989, and therefore this Petition for Writ of Certiorari filed.

The review of a state court decision is not sought but the review the 6th Circuit Court of Appeals and the U.S. District Court is sought to be determined by this Petition for Writ of Certiorari in the United States Supreme Court and the basis for federal jurisdiction in the court of first instances is unknown to the Petitioner in that the real estate in question was located in Clay County, Kentucky and should have been filed in state court in the first instance.

ARGUMENT FOR ALLOWANCE OF WRIT

COMES NOW the Petitioners, and

for argument amplifying the reasons relied on for the reliance of the Writ and state as follows:

The Petitioners contend that the 6th Circuit Court of Appeals compounded the error of the United States District Court by affirming the District Court's decision setting aside the deed to Petitioners' one-half (½) undivided interest in real estate that he had received by deed in July of 1979 and by doing so, has departed from the accepted and usual course of judicial proceedings by sanctioning such a departure by the U.S. District Court and therefore the U.S. Supreme Court is the court of last resort to correct this error on behalf of the United States 6th Circuit Court of Appeals.

The Petitioner contend that the deed dated June 15, 1979, to their one-half (½) undivided interest is good and sufficient to pass title, and did pass title to the

Petitioners with the Executrix having such authority to sell by the Last Will and Testament of her father, Albert Baker, deceased, and that the Petitioners did not have actual or constructive knowledge that the property purchased by the 1979 deed was the subject of litigation at the time of the purchase nor at any other time through 1983.

The Petitioners could not have had constructive knowledge in that the Executrix, nor the other Appellees filed a Lis Pendens Notice in compliance with K.R.S. 382.440(1) which further compounds the error by the U.S. District and U.S. 6th Circuit Court of Appeals.

The U.S. District Court in its Findings of Fact, stated as follows:

> "On June 11, 1976, Zelma Pierce's deposition was taken at her attorney's office during which her complaint for sale of all the land was thoroughly and specifically discussed. Her brother, Homer Baker, was present

at the deposition and thus had actual knowledge that the land was the subject of litigation."

Based upon the above findings the U.S. District Court divested the Petitioner herein of his one-half (½) undivided interest in the property in question as that Petitioner knew the property was the subject of litigation and ordered that Jones retain his one-half (½) undivided interest in that Jones had no knowledge of any impairment to the title.

A reading of the June 11, 1976 deposition of Zelma Pierce (see item 18, in the District Court docket sheet) in which the Petitioner herein was present, Zelma testified with reference to the "home place" and did not testify specifically about any thing with reference to the property in question herein, that was purchased by Homer Baker in 1979 other than setting forth certain grantors, date of deeds and the deed book and page where

said deeds were recorded and which the Executrix made a part of her testimony and marked as exhibits.

There is nothing in the record or the testimony of the Executrix that reveals any specific discussion of the particular property in question herein nor was her complaint specifically discussed and no one, not even a lawyer could interpret the deposition testimony as to what it was about and surely, the Petitioner herein, could not be charged with having comprehended what happened in such a simple deposition with nothing specifically discussed about the property involved herein and, evidentally, said deposition was the key to the ruling of the U.S. District Court.

The evidence of the Petitioner herein, in the U.S. District Court, simply stated that he knew something about a suit to sell the "home place" but did not know that the property that he purchased

in 1979 was the subject of any litigation whatsoever. John V. Jones, who is co-owner of the property in question, which was purchased by Petitioner and Jones in 1979 did not know the property in question was involved in litigation and therefore doesn't it seem logical that if Homer Baker had known the property in question was involved in a law suit that he would have discussed this with John V. Jones on at least one (1) occassion and Jones did not learn of litigation until approximately four (4) months prior to February of 1984 and the district court set aside the June 1979 deed because the Petitioner had actual knowledge of the litigation in 1976 and the deed was not made or the property purchased until some three (3) years when the record taken as a whole clearly shows that the Petitioner did not have actual knowledge or constructive knowledge that the property that he purchased

in 1979 was the subject of litigation in 1979. We can only surmise that the U.S. District Court assumed that the Petitioner had knowledge of the litigation in 1979 but there is not one ounce of proof in this record whatsoever of same. The Executrix made contact with the Petitioner and offerred to sell the land to him and not visa versa.

It is undisputed, according to the Executrix's testimony, that the "home place" is separate from the property that was deeded to Petitioner, Homer Baker and the Appellee, John V. Jones.

It can actually be taken from the record that the Executrix, at the time she sold the property to the Petitioner did not know that the property that was being sold was subject of litigation in the U.S. District Court and therefore, how could the Petitioner be charged with

having such knowledge by one (1) brief deposition taken some three (3) years prior to the property purchase.

See Isaacs' Adm. et al, v. Hignite, et al, 95 S.W. 2d, 1116 (Ky. 1936) where the court stated:

> "A purchaser for good faith in value is to be favored by the law. The presumption of innocence is in his favor, and, to rebut this, the circumstances must be such as to satisfy the mind that he had notice of the vendor's intention to defraud his creditors."

In the case of Buckner v. Buckner, et al, 215 S.W. 420, (Ky. 1919) setsforth the rule for the Commonwealth of Kentucky and is quoted as follows:

> "The purchaser of land from an Executor as such must know whether or not the latter is authorized by the will to make the sale, and if there is no power the purchaser is not an innocent purchaser or bona fide purchaser; but where the Executor has the power to sell the purchaser acquires good title notwithstanding the Executor's bad faith, in absence of knowledge thereof."

The only complaint filed against the Petitioner herein, in the U.S. District Court, was a Third-Party Complaint (treated as a cross-claim) filed on behalf of one (1) of the heirs, Oma Baker, which in essence are bare pleadings that state that the Executrix illegally and unlawfully sold and executed a deed to the Appellants for a grossly and inadequate and unreasonable consideration and that the said Appellants had entered into a lease of surface rights on said real estate for a consideration of more than thirty (30) times the purchase price and that the conveyance of said real estate was an abuse of Executrix's authority under the will and was fraudulent by the very nature and consideration of said conveyance. It should be noted that the Third-Party Complaint (cross-claim) did not indicate anything as to whether the Petitioner herein, Homer Baker, was or was not a bona fide purchaser or that

the said Homer Baker did anything wrong whatsoever and was completely void of any evidence to substantiate the allegations setforth in said Third-Party Complaint and, moreover, all of the evidence is to the contrary.

In the case of Consolidated Coal Company V. King, 244 S.W. 303 (Ky. 1922) it was held that neither pleadings without proof nor proof without pleadings will entitle the litigant to relief.

In the case of Cecil v. Cecil Executrix, 215 S.W. 794, it was held that Judgment must be ruled by the pleadings and, if it is not supported by them, it is considered fatally erroneous.

It is clear that the Third-Party Complaint did not state a cause of action against this Petitioner but was against the Executrix, the seller of the property. No proof whatsoever was taken to substantiate

any cross-claim and the Third-Party Complaint had not been amended nor any proof taken against these Petitioners and therefore no cause of action existed against these Petitioners.

The state of the title was clear, the Executrix had power to sell by will, there was nothing of record in the county in which the property is located to give a buyer notice of a pending law suit or alert a buyer that the power of sale on behalf of the Executrix was somehow in question.

Now, the 6th Circuit Court of Appeals affirmed the U.S. District Court even though they stated that at the time of the 1979 purchase from the Executrix, the Petitioner herein, Homer Baker, had actual knowledge that the land he bought was the subject of litigation between the Executrix, Zelma Pierce and other

heirs of Albert Baker. They went on to state that in support of the Petitioners' points on appeal, Homer Baker points to several factors demonstrating his lack of knowledge: his sworn affidavits and deposition, both suggesting he did not learn that the litigation involved the property until 1983; the affidavit and testimony of Jones, testified to his own lack of knowledge, thereby inferring that Baker must not have known or he would have told his co-owner; the apparent belief of Zelma Pierce, the Executrix, and her counsel, that in 1979, nothing stood in the way of Baker's purchase; the failure of all parties to file a Notice of Lis Pendens; and Baker's sworn testimony that he did not learn that all testated property was involved in the 1976 action when he attended a deposition with Zelma Pierce in 1976.

The 6th Circuit Court went on

to state that despite this evidence, we affirm the district court's determination, a party, such as Baker, requesting the Court of Appeals to over turn a factual finding made by a district court has a heavy burden to shoulder. We will reject a district court's factual finding only when that finding is clearly erroneous. Fed. R. Civ. P. 52.1. and quoted as follows:

> "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court, on the entire evidence is left with the definate and firm conviction that a mistake has been committed."
>
> United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court over steps the bounds of its duty under Rule 52(a) if it undertakes to duplicate

the role of the court.... if the district court's account of the evidence is plausible in light of the record, viewed in its entirety, the Court of Appeals may not reverse even though convinced that had it been setting as the trier of fact, it would have weighed the evidence differently. Where there are two permissable views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

The 6th Circuit went on to state that given the evidence before the district court, we cannot say that its conclusion was clearly erroneous. The 6th Circuit Court went on to state other matters in its Opinion, which is in the Appendix hereto but stated finally, in making sure all the tracts were correctly labled and accounted for, the Executrix agreed that tract number 6 was one that had been conveyed by Homer Baker to Albert Baker in 1946.

Upon hearing discussion relating to this tract, Homer Baker, having himself once owned this particular tract before conveying it to his father, seemingly would have known that the Executrix could not be discussing solely the home place and therefore the Petitioner herein, Homer Baker, actually knew that tracts 3-8 were subject of the suit.

It was pointed out in the Petitioners' Petition for Reconsideration/Rehearing that the Petitioner herein, Homer Baker, was only eleven (11) years old in 1946 and was not the owner of the property nor did he convey any property to his father in 1946, and therefore the Homer Baker mentioned in the Opinion by the 6th Circuit Court of Appeals was an uncle of this Petitioner, Homer Baker, and not Homer Baker himself.

In Petitioners' Petition for Rehearing/Reconsideration, it was pointed

out to the 6th Circuit that the Petitioner herein, Homer Baker, was not the same Homer Baker that transferred the property to his father, Albert Baker, in 1946 but that Homer Baker was only eleven (11) years old in 1946 and could, of course, not transfer property at that tender age.

CONCLUSION

In conclusion it is the position of the Petitioner that both the U.S. District Court and U.S. 6th Circuit Court of Appeals has made a grave error in this matter and this is the last source for review of this matter and therefore the U.S. Supreme Court should accept this Petition for Writ of Certiorari to correct this grave error which divested the Petitioner of his property without due process of law in that the facts and law support the position of the Petitioner herein.

Respectfully submitted,

HON. JOE T. ROBERTS
405 South Main Street
P.O. Box 176
London, Kentucky 40741
TELEPHONE: (606) 878-6111

BY:
JOE T. ROBERTS

CERTIFICATION

The undersigned hereby certifies that he has mailed three (3) true and correct copies of the foregoing to the following:

(1) Hon. Elmer Cunnagin
Cunnagin & Cunnagin
4th at Main Street
London, Kentucky 40741

(2) Hon. Robert L. Milby
120 North Main Street
London, Kentucky 40741

All on this the 15th day of March, 1989.

OF COUNSEL FOR PETITIONERS

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LONDON

ZELMA PIERCE, ET AL, PLAINTIFFS,

VS. MAGISTRATE'S REPORT
AND RECOMMENDATION C.A. #74-325

OMA BAKER, ET AL, DEFENDANTS.

* * * * *

This action is currently before the Magistrate pursuant to the referral order of January 8, 1981, directing the Magistrate to determine the divisibility of the property and a plan of sale, if the property is not divisible. The presiding Judge entered a Memorandum Opinion on the same date adopting the Findings of the Magistrate's Report filed August 6, 1979, except as to certain findings of forgery and fraud. The undersigned Magistrate then conducted a hearing and on February 24, 1981, at which time all parties orally stipulated that the property

in question is not divisible. The plaintffs were given fifteen (15) days in which to file in the record an attested copy of a certain deed which was executed on or about June 15, 1979, between Zelma Pierce, Executrix of the estate of Albert Baker, and Homer Baker and John V. Jones, for a certain tract of real estate in Clay County, Kentucky, for the consideration of $36,630.00, which is a part of the real estate described in the complaint in this action.

The defendants were granted 30 days after the filing of said deed in which to file any pleadings that wre appropriate and would concern the effect of said deed on the issues of this case. Thereafter, and on March 12, 1981, the plaintiff filed a document styled "Withdrawal Of Portion Of Complaint" wherein she stated that she was withdrawing a portion of her complaint which requested the

Court to sell the property described in paragraph 10 of the complaint and, more particularly, described as Tracts Nos. 3 through 8 of said paragraph. The plaintiffs attached thereto a copy of the will of Albert Baker and an attested copy of a deed dated June 15, 1979, from Zelma Pierce Reidling to Homer Baker and John V. Jones. The land described in the June 15, 1979, deed has the same description given for tracts Nos. 3 through 8 of paragraph 10 of the complaint. The plaintiff, Zelma Pierce, on March 13, 1981, filed a motion for an order for the removal of a deed dated December 27, 1978, from the Clay County Clerk's records, said deed being from Easter Jordan Baker to Eva M. Greer and Fred M. Greer and Elbert Ray Baker and Jackie Baker. Plaintiffs furthe requested the Court to declare said deed to be null and void and to order that the grantees

have no interest or claim to the real estate described therein.

On March 16, 1981, the defendants, Eva Greer, Fred Greer and Fred Baker filed an objection to the plaintiffs' "Withdrawal of Portion Of Complaint" on several grounds. They are: the plaintiffs have sold the property without Court approval after filing a complaint to have the Court sell the property; that they received no notice of sale from the plaintiffs; that the price plaintiff received was inadequate and that the sale was not conducted fairly as one of the purchasers was a relative of the plaintiff Zelma Pierce (her brother).

The defendant, Oma Baker, also filed an objection to plaintiff withdrawing a portion of the complaint for reasons similiar to those of the other defendants. Oma Baker also contends that the plaintiff waived any right she might have had under

the will to sell the property by filing this action and further submits that to allow plaintiff to withdraw a portion of the complaint now after the previous trial had been conducted by the Magistrate and findings made by the Court would greatly prejudice all of the defendants. Finally, Oma Baker requests that the deed of June 15, 1979, be declared null and void and that the Court appoint an appraiser to appraise the real estate described therein.

Plaintiff filed a response to these motions on March 25, 1981. Therein she submits that the defendants have not been prejudiced, that the Court's time has not been wasted and that the price received from the sale in question was more than adequate.

On March 25, 1981, the defendants, Eva M. Greer, Fred Greer, Elbert Ray Baker and Jackie Baker, filed a motion,

through counsel, requesting the Court to cancel and set aside the June 15, 1979, deed because the deed was contrary to the orders of the Court, the consideration was inadequate and there was a badge of fraud attached thereto since the sale was to a relative. The undersigned Magistrate conducted a hearing on April 29, 1981, and took all these motions under advisement.

On March 10, 1982, the defendant Oma Baker filed a motion for the Court to allow her to file a Third Party Complaint against Homer Baker and his wife Lottie Ruth Baker, John V. Jones and his wife Iva M. Jones, and Shamrock Coal Company, Inc., Box 36A, Beverly, Kentucky. The defendant also tendered a Third Party Complaint along with this motion.

On March 29, 1982, Easter Jordan Baker, a defendant who had been previously dismissed from this action, filed a motion to intervene or in the alternative to

be rejoined in the action. On April 1, 1982, the plaintiff, Zelma Pierce (now Reidling) filed a response and objection to each of these motions, that is, the motion to file a third party complaint and the motion to intervene or be rejoined.

This brief review demonstrates how an essentially simple case can become complicated by the unilateral actions of the parties. First, it should be noted, the plaintiff did not file a motion to withdraw a portion of the complaint. (However, the Magistrate, at the April 24, 1981, hearing ordered that the plaintiff's "Withdrawal" would be treated as a motion to withdraw.) A plaintiff can withdraw a portion of the complaint in one of two ways. First, she can amend the complaint under the provisions of Rule 15(a), F.R.C.P. Under Rule 15(a) a party may only amend the pleading upon leave of Court or by written consent of the adverse party.

The grant or denial of leave to amend is a matter that is within the discretion of the trial court, Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and is subject to reversal on appeal only for an abuse of that discretion. Foman v. Davis, 371 U.S. 178 (1962); Estes v. Kentucky Utilities Co., 636 F.2d 1131 (6th Cir. 1980). There is a policy of allowing amendments to be made at any time during litigation. Co-existing with the liberal amendment policy is the principle that a party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time. In most cases, delay alone is not a sufficient reason for denying leave. Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Indus. of S. California, 648 F.2d

1252 (9th Cir. 1981); Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479 (6th Cir. 1973). However, an amendment clearly should not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the dealy, the proposed amendment, if permitted, would have the effect of prejudicing another party to the action. Gregory v. Mitchell, 634 F.2d 199 (5th Cir. 1981) (amendment denied after motions for summary judgment taken under submission); Johnson v. Trueblood, 629 F.2d 287 (3rd Cir. 1980) (amendment denied when requested on the 43rd day of trial). As a general rule, the risk of substantial prejudice increases with the passage of time. Nilsen v. City of Moss Point, Miss., 621 F.2d 117 (5th Cir. 1980); Woodson v. Fulton, 614 F.2d 940 (4th Cir. 1980).

The second method where a plaintiff can withdraw a portion of the complaint

is found under Rule 41(a) of the F.R.C.P. Rule 41(a) provides that a plaintiff can dismiss an action without a court order if (1) he filed a notice of dismissal before an answer or motion for summary judgment is served by an adverse party, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Rule 41(a)(2) provides that except as provided in paragraph (1) of Rule 41(a), an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. The proper way for a plaintiff to obtain an order of the court dismissing an action under Rule 41(a)(2) is to file a motion. Diamond v. United States, 267 F.2d 23, 25 (5th Cir. 1959). Dismissal on motion under Rule 41(a)(2) is within the sound discretion of the court. Garner v. Missouri-Pacific Lines, 409 F.2d 6

(6th Cir. 1969); Sams v. Beech Aircraft Corp., 625 F. 2d 273 (9th Cir. 1975); Armstrong v. Frostie Co., 453 F. 2d 914, 916 (4th Cir. 1971); La-Tex Supply Co. v. Fruehauf Trailer Division, Fruehauf Corp., 444 F.2d 1366 (5th Cir. 1971). A district court under Rule 41(a)(2) is reviewable only for abuse of discretion. Stern v. Barnett, 452 F. 2d 211, 213 (7th Cir. 1971); American Cyanamid Co. v. McGhee, 317 F.2d 295 (5th Cir. 1963). The purpose of Rule 41(a)(2) is primarily to prevent voluntary dismissals which unfairly affect the other side and to permit the imposition of curative conditions. Alamance Industry, Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir. 1961). The court's discretion under this rule is to be exercised with due regard to the legitimate interest of both plaintiffs and defendants but the essential question is whether dismissal of the action will

be unduly prejudicial to the defendant. Nance v. Johnson, 56 F.R.D. 463 (D. Ala. 1972); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); Durham v. Florida East Coast Railway, 385 F.2d 366 (5th Cir. 1967). An especially strong showing is required of the plaintiff to warrant voluntary dismissal after the plaintiff has concluded his evidence or after a verdict has been directed for the defendant. In its discretion, the court should consider the expense and inconvenience to the defendants and should deny the motion if the defendants would be seriously prejudiced by a dismissal. Williams v. Ford Motor Credit Co., 627 F.2d 158 (8th Cir. 1980); Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974).

In the present case the plaintiff never informed the Court that she would like to dismiss part of her complaint until February 24, 1981, when this matter

was referred to the undersigned Magistrate to determine divisibility of the property. The Magistrate now finds that the defendants are greatly prejudiced by the ex parte sale by the plaintiff to her relative without any notice whatsoever to the defendants. The defendants, had they known about the sale, could have made sure the transaction was a bona fide arm's length transaction for just and adequate consideration. The defendants may also have avoided defending most of this action since the sale occurred before the trial of this case before the Magistrate on July 26, 1979. The fact that the plaintiff had the power to sell the property under the will of Albert Baker does not allow her to unilaterally moot a portion of her complaint which had been pending for five years. The case was almost ready for judgment, subject to divisibility; however, because

the plaintiff never gave notice of the sale to the Court or to the defendants, a great deal of time has been wasted. This is, of itself, a serious prejudice to the defendants. Accordingly, the plaintiffs should not be permitted to withdraw part of the complaint.

The defendants also request that the deed dated Jun3 15, 1979, between Zelma Pierce Reidling and Homer Baker and John V. Jones, be set aside, cancelled and held for naught. As grounds for this request the defendants point out that this sale was from the Executrix of Albert Baker's will (Zelma Pierce Reidling) to her brother (Homer Baker); that the sales price of $36,630.00 was inadequate and that the Executrix was estopped from selling the land through the powers of the will when she filed this complaint requesting the Court to sell the property.

An executrix of a will has a fiduciary duty to the other heirs of a decedent. First State Bank of Pineville v. Catron, 105 S.W. 2d 162, 166 (Ky. 1937). Within that fiduciary duty is the principle that all of the Executrix's actions should be fair and arm's length transactions with no dealing with an entity where she has substantial interests. Id. A secret sale to her brother, without notice to the other heirs is a clear violation of that fiduciary duty. First State Bank of Pineville v. Catron, supra. There the court quoted from the Restatement of Law of Trusts:

> "a trustee violates his duty if he sells trust property to a firm of which he is a member or to a corporation in which he has a controlling or substantial interest. ... It is immaterial that the trustee acts in good faith in purchasing the property for the trust, and that he pays a fair consideration." Id.

The June 15, 1979, deed from Zelma Pierce Reidling to Homer Baker and John V. Jones should be set aside, cancelled, and held for naught for the previously stated reasons. (Prejudice to the defendants; sale was without the permission of the Court or notice to the defendants; sale to Executrix's brother violated plaintiff's fiduciary duties, and defendant's claim of inadequate consideration.)

The plaintiffs request an order directing the removal of record of a deed dated December 27, 1978, from Easter Jordan Baker to Eva M. Greer and Fred Greer, and Elbert Ray Baker and Jackie Baker. This motion should be granted as the Court has previously determined in its Memorandum Opinion of January 8, 1981, that Easter Jordan Baker had no interest in the property which is the subject of this action and that said

deed is a cloud upon the title to the subject property.

The defendant's motion to appoint appraisers to appraise the real estate in question is well taken and should be granted. At least two independent appraisers should be appointed to make an appraisal of the property to ascertain its fair market value and to report same to the Court.

The defendant, Oma Baker, has filed a motion to file a Thirty Party Complaint against Homer Baker and his wife Lottie Ruth Baker, John V. Jones and his wife Iva M. Jones, and Shamrock Coal Company, Inc., Box 36A, Beverly, Kentucky. This motion should be granted so that all parties claiming title to this land will be before the Court in order to clear up the question of ownership of the property. The Third Party Complaint now tendered should be filed and process

issued.

The motion of Easter Jordan Baker to intervene or to be rejoined should be denied. No good cause has been shown as to why she should be allowed back into this case. This litigation could go on ad infinitem if all parties were allowed two bites at the apple.

For the foregoing reasons, it is the recommendation of the Magistrate that:

(1) The plaintiffs' Motion To Withdraw Portion Of Complaint which was filed on March 12, 1981, be overruled;

(2) The Motion to Declare Deed Void of the defendant, Oma Baker, which was filed on March 23, 1981, be sustained and that the Court order that the deed dated June 15, 1979, between Zelma Pierce Reidling, as Executrix of the Estate of Albert Baker, deceased, party of the first part, and Homer Baker, of Berea,

Kentucky, and John V. Jones, of Waco, Kentucky, parties of the second part, which is of record in Deed Book 163, page 678, Clay County Court Records, is null and void;

(3) The Motion of the defendants, Eva M. Greer, Fred M. Greer, Elbert Ray Baker and Jackie Baker, which was filed on March 25, 1981, to cancel set aside and hold for naught the deed described in the preceding paragraph be sustained and that such order be entered;

(4) The Motion of the plaintiff, Zelma Pierce (Reidling) which was filed on March 13, 1981, to declare null and void the deed from Easter Jordon Baker to Eva M. Greer, Fred M. Greer, Elbert Ray Baker and Jackie Baker dated December 27, 1978, recorded in Deed Book 162, page 242, Clay County Court Records, be sustained and that such order be entered;

(5) The aforesaid motion of

the defendants be sustained in their request for appointment of appraisers and that the two independent appraisers be appointed to make an appraisal of the property which is the subject of this action and to ascertain and report its fair market value to the Court;

(6) The Motion of the defendant, Oma Baker, to file a Third Party Complaint which was filed on March 10, 1982, be sustained and the tendered Thirt Party Complaint be filed and process issued thereon;

(7) The Motion To Intervene And Motion to Rejoinder of Easter Jordan Baker, which was filed on March 20, 1982, be overruled.

The Clerk shall forward a copy of this Report and Recommendation to the respective parties who shall, within ten (10) days of recript hereof, serve and file objections hereto. A party

shall file objections to the Magistrate's Report and Recommendation with the District Court or else waives the right to appeal the decision of the District Court. Objections must be filed within ten (10) days of receipt or further appeal is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

This 27th day of July 1983.

/s/ James F. Cook
James F. Cook, U.S. Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 74-325

ZELMA PIERCE, ET AL, PLAINTIFFS,

VS. ORDER

OMA BAKER, ET AL, DEFENDANTS.

The Court, by Order dated August 26, 1983, referred this action to United States Magistrate James F. Cook for purposes of reconsideration of his Report and REcommendation dated July 27, 1983, in light of the special objection made by Homer Baker and John V. Jones, also, Magistrate Cook having filed a Supplemental Report and Recommendation, affirming his July 27, 1983, recommendations, and Baker and Jones again having filed an objection thereto, the Court being advised, hereby

ORDERS AS FOLLOWS:

1. The Report and Recommendation

as supplemented, be and is adopted in full.

2. The plaintiffs' motion to withdraw portion of complaint which was filed on March 12, 1981, be and is denied.

3. The motion to declare void of the defendant, Oma Baker, which was filed on March 23, 1981, be and is sutained.

4. The deed dated June 15, 1979, between Zelma Pierce Reidling, as Executrix of the Estate of Albert Baker, deceased, party of the first part, and Homer Baker, of Berea, Kentucky, and John V. Jones of Waco, Kentucky, parties of the second part, whichi s of record in Deed Book 163, page 678, Clay County Court Clerk's Office, be and is null and void.

5. The motion of the defendants, Eva M. Greer, Fred M. Greer, Elbert Ray Baker and Jackie Baker, which was filed on March 25, 1981, to cancel, set aside and hold for naught the deed described

in the preceding paragraph be and is sustained.

6. The motion of the plaintiff, Zelma Pierce (Reidling) which was filed on March 13, 1981, to declare null and void the deed from Easter Jordon Baker to Eva M. Greer, Fred M. Greer, Elbert Ray Baker and Jackie Baker dated December 27, 1978, recorded in Deed Book 162, page 242, Clay County Court Clerk's Office, be and is sutained.

7. The aforesaid motions of the defendants be and are sustained in their request for appointment of appraisers and that the two independent appraisers be appointed to make an appraisal of the property which is the subject of this action to ascertain and report its fair market value to the Court.

8. The motion of the defendant, Oma Baker, to file a third-party complain which was filed on March 10, 1982, be

and is sustained and the tendered third-party complaint be filed and process issued thereon.

9. The motion to intervene and motion to rejoinder of Easter Jordan Baker, which was filed on March 20, 1982, be and is overruled.

This 5th day of October, 1983.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR., JUDGE

NO. 85-5700

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HOMER BAKER and his wife, LOTTIE RUTH BAKER; JOHN V. JONES and his wife, IVA M. JONES,

Appellants,

v.

ZELMA PIERCE, Executrix of the Estate of ALBERT BAKER, deceased; ZELMA PIERCE and her husband, MARTIN PIERCE; OMA BAKER, a widow; OVA BAKER and his wife, ROSIE BAKER; THELMA HIBBS and her husband, J.W. HIBBS; EVA GREER and her husband FRED GREER; JEAN CARLISLE and her husband, NORMAN CARLISLE; RAY BAKER and his wife, JACKIE BAKER; BARBARA BAXTER and her husband, JAMES H. BAXTER; HEIRS AT LAW OF ALBERT BAKER, deceased; CONTINENTAL COAL COMPANY, INC.; and SHAMROCK COAL COMPANY, INC.,

Appellees.

On Appeal from the United State District Court for the Eastern District of Kentucky

/

Before: ENGEL and GUY, Circuit Judges, and SUHRHEINRICH, District Judge.*

PER CURIAM. Third-party defendants,

*Honorable Richard F. Suhrheinrich, United States District Court, Eastern District of Michigan, sitting by designation.

Homer and Lottie Ruth Baker and John V. and Iva J. Jones, appeal a district court judgment ordering that a deed conveying real property to them be set aside and that the property be partitioned or sold. For the reasons given below, we vacate the judgment of the district court and remand for further proceedings.

The facts and history of this case are long and complicated.[1] Albert

[1]Because this case is a probate-related matter, the court ordered oral argument and supplemental briefs to determine whether we had subject matter jurisdiction. Based on the representations of counsel and on Kentucky law regarding sale of estate assets, we now believe that we do have jurisdiction, Under Kentucky law, an action for the sale of real property belonging to an estate is not brought in the court charged with probate administration, but is to be brought in the county circuit court, a court of general jurisdiction. Ky. Rev. Stat. §24A.210. Thus, by assuming jurisdiction, we are not interfering with a state court with exclusive probate jurisdiction, nor are we interfering with property which was first within the jurisdiction of a state court. Cf. Starr v. Ruff, 421 F.2d 999, 1004-1005 (6th Cir. 1970). At the same time, while a federal court may technically have jurisdiction, this case serves as an example why federal courts should and usually do decline to exercise jurisdictin in probate-related matters. First, this is an area of the law in which state courts have developed expertise. Secondly, this matter concerns the title to real property, a matter of unique local concern.

Baker died testate in Madison County, Kentucky, on November 29, 1972. Zelma Pierce, Albert's daughter, was appointed executrix of her father's estate. Included in the will was a grant of power to the executrix to sell real estate included within the probate estate except for the homestead. In 1974, Zelma Pierce filed a complaint in the United States District Court for the Eastern District of Kentucky seeking partition or sale of all of the real property. Named as defendants were Oma Baker, Albert's widow, and the heirs of Albert Baker, excluding Homer Baker. Homer Baker was not named in the complaint because he had purportedly conveyed all of his interest in the real estate to two of his sisters, one of whom was Zelma Pierce. The complaint requested the court to sell the real estate owned by Albert Baker at the time of his death and distribute the proceeds.

The case was tried before a United States Magistrate onJuly 25, 1979. Following trial, the magistrate issued a report and recommendation to the effect that the property be sold after a determination of its divisibility. The findings of the magistrate were adopted by the district court on January 8, 1981, which also adjudged the interests of the parties and remanded the case to the magistrate for a plan of sale. A hearing was held on February 24, 1981, to determine the divisibility of the property and a plan of sale. At the hearing, all parties stipulated that the property could not be divided without materially affecting the value.

At that time, plaintiff Zelma Pierce, executrix, through her attorney, revealed to the court that she had sold tracts 3-8, a major portion of the real estate that was the subject of this lawsuit

to her brother, Homer Baker and his wife, and to John V. and Iva J. Jones for $36,630.00 by deed dated June 15, 1979. Subsequently, it was also discovered that the Bakers and JOneses entered into a coal lease with Shamrock Coal Company. The lease provided for royalty payments at the rate of $1.00 per ton of coal removed with minimum royalty payments of $12,000.00 per year for a period of five years. It was estimated by a representative of Shamrock that there were over one million tons of recoverable coal on the property.

On March 12, 1981, plaintiff executrix filed a pleading entitled "Withdrawal of Portion of Complaint", stating that she was withdrawing that portion of her complaint which requested the court to sell the property described in the complaint as tracts 3-8. Defendant heirs Oma Baker, Eva Greer, Fred Greer, and

Fred Baker filed an objection to plaintiff's "Withdrawal of Portion of Complaint" and moved that the deed from Zelma Pierce to the Bakers and Joneses be declared null and void.

After a hearing conducted on April 29, 1982, the magistrate recommended the following:

1) that plaintiff's "Withdrawal of Portion of Complaint" be treated as either a motion to dismiss under Fed. R. Civ. P. 15(a) or as a motion to dismiss under Fed. R. Civ. P. 41(a), and that in either case, the motion should be denied because it is untimely and prejudicial to defendants;

2) that the deed from Zelma Pierce to the Bakers and Joneses be held null and void;

3) that two independent appraisers be appointed to make appraisals of the property; and

4) that defendant Oma Baker be permitted to file a third-party complaint naming the Bakers and Joneses (hereinafter grantees) as third-party defendants.[2]

Subsequently, the grantees filed a motion to alter, amend or vacate the court's adoption of the magistrate's report and recommendation. This matter was referred to the magistrate. Grantees raised three arguments in the motion: first, that the court's adoption of the report and recommendation was entered through inadvertence or mistake and that

---

[2]Allowing defendants to file a third party complaint against the Bakers and Joneses was erroneous. Under Fed. R. Civ. P. 14(a), a third party complaint is permitted only when the third party plaintiff is attempting to transfer liability for the plaintiff's claim against him. The third party defendant's liability must be secondary or derivative. Such is not the case here. At the same time, the grantees could properly have been joined as defendants in this matter under Fed. R. Civ. P. 19. Once so joined, the defendant heirs could seek the same relief by filing a cross-claim. Such a claim would be within the ancillary jurisdiction of the court. In order to permit the appeal, the third party complaint as a cross-claim.

it was unclear and conflicting; second, that the grantees had not had their day in court so as to enable them to prove that their June 15, 1979, dealing with the plaintiff Zelma Pierce was an arms-length transaction; third, that the order declaring the deed null and void conflicted with the court's order permitting the defendant Oma Baker to file a third-party complaint against the grantees.

The magistrate rejected the first argument. As to the second, the magistrate found that the rights of the grantees were carefully considered in all respects. Furthermore, the magistrate determined that plaintiff's fiduciary duty prohibited her from dealing with those with whom she has a substantial interest and that the sale here clearly violated that duty. Therefore, the court held such proof as the grantees would attempt to put before the court would be immaterial

and irrevelant. Finally, the magistrate rejected the contention that permitting a third party complaint to be filed was inconsistent with declaring the deed to be null and void. The district court accepted the magistrate's report and recommendation over the grantees' objections.

On appeal, grantees challenge the district court's order setting aside the conveyance of tracts 3-8. They make two arguments: first, that there was no showing of wrongdoing on behalf of the plaintiff executrix, and, even if there was such a showing, grantees were good faith purchasers for value, without notice of any wrongdoing; and second, that the executrix had the power of sale in the will and therefore she did not need the court's permission to sell the property.

I

The grantees are correct in their contention that a breach of fiduciary duty alone is insufficient to set aside this conveyance. While a sale of land that constitutes a breach of fiduciary duty may render an executor liabile for such breach, it does not necessarily void the conveyance. If the grantees are bona fide purchasers for value, and the executor has the aughority to sell, they acquire good title to the property and the deed is not void. In Buckner v. Buckner, 185 Ky. 540, 215 S.W. 420 (1919), the court stated:

> The will . . . gave . . . [the executors] authority to sell [land] for the purposes of paying debts. If they transcended their authority, they are responsible to the heirs or devisees; but bona fide purchasers from them or their vendees cannot be affected, unless they have notice of the improper conduct of the executors. . . . The testator reposed confidence in them, and gave them authority to act, and thereby strangers

> were invited to entertain confidence. It would therefore be unjest to permit strangers, who purchased in good faith, to sustain injury from the fraud of the executors.

Id. at 425 (quoting Larues Heirs v. Larues Executors, 26 Ky. (3. J.J. Marsh.) 156 (1830).

Accordingly, that plaintiff may have breached a fiduciary duty in selling the property is insufficient to set aside the deed and the magistrate's ruling to that effect was in error. In order for the transaction to be void, the grantees would have to be found not to be bona fide purchasers. As there has been no such finding, we cannot sustain the court's judgment.

II

Defendants assert that the judgment may be affirmed on alternative grounds. Specifically, while acknowledging that plaintiff had the power to sell tracts 3-8 in the will, defendants argue that by bringing this action to sell the land,

the power to sell was forfeited or at least suspended. Consequently, they contend that plaintiff had no power of sale at the time of the transaction, and therefore no transfer could take place without the approval of the court. The grantees assert that the power of sale in the will was always effective to grant such authority and that court approval was therefore unnecessary.

There is some general common law support for defendants' argument that a power of sale may be lost or forfeited. It is generally held, for instance, that where an executor does not exercise a power of sale within a reasonable time, such power is terminated. See In re Rolczynski, 349 N.W.2d 394, 397 (N.D. 1984); Brandt v. Phipps, 398 111. 296, 311, 75 N.E.2d 757, 764 (1947); Bryant v. Fingerlos, 138 Neb. 867, 871-875,

295 N.W. 896, 898-900 (1941); Hood v. Shively, 31 S.W.2d 283, 284 (Mo. App. 1930). Moreover, it has also been held that once a complaint for partition or sale is filed, a power of sale under a will is suspended; and once partition or sale is ordered, the power of sale is completely destroyed. Vierieg v. Krehmke, 293 111. 265, 127 N.E. 735, 737 (1920).

Here, plaintiff waited approximately seven years before exercising the power of sale in the will. This lapse of time, together with her action of filing suit and then inducing the other heirs to believe that there would be court approval and supervision of the sale, certainly militate for a finding that plaintiff forfeited the power of sale. Nonetheless, we do not believe that the State of Kentucky would adopt such a rule in the instant case.

None of the above cases presented a grantee claiming bona fide purchaser status who took without notice of wrongdoing or irregularity, from an executor exercising a power of sale. We do not believe that the common law rules cited above could operate to divest such a bona fide purchaser of title to property.[3]

Here, the grantees claim such status. This result is consistent with

---

[3]Of course, if a notice of lis pendens had been filed on the property record there could be no bona fide purchaser. See Ky. Rev. Stat. §382.440(1). We are unable to determine on this record whether the state of the title was such as to give a buyer notice of the pending lawsuit or to alert a buyer that the plaintiff's power of sale was somehow in question.

the reasoning of the Kentucky court in Buckner:

> Where one purchases land from an executor as such, he is bound to know whether or not the latter is authorized by the will to make the sale, and if the executor has no such power the purchaser is not an innocent or bona fide purchaser. But where the executor has power to sell, a purchaser from his acquires good title, notwithstanding the bad faith of the executor in making the sale, where he had no knowledge of such bad faith . . . . And if [the purchaser] has notice that the sale is made for a purpose other than that for which the will empowers the executor to sell, or is otherwise unauthorized, the legal title of the devisees is not divested. Where the sale is tainted by fraud and covin between the executor and the purchaser, it is absolutely void, and the title to the property remains unchanged.

215 S.W. at 425.

Accordingly, we hold that if the grantees are bona fide purchasers without notice of any impairment of the power of sale, the deed was effective to pass title to the property. If, however, the grantees were not acting in good

faith, or had actual or constructive notice that the property was the subject of litigation, the transaction may be set aside. Alternatively, as set forth in Part I, if the transaction between plaintiff and the grantees was fraudulent as to the defendants, the rransaction is void.

Because there has been no finding as to whether the grantees were bona fide purchasers without notice, thejudgment of the district court must be VACATED and the case REMANDED for proceedings consistent with this opinion.

ISSUED AS MANDATE: 2/18/87

COST: none

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

LONDON

CIVIL ACTION NO. 74-325

ZELMA PIERCE, ET AL, PLAINTIFFS,

VS. MEMORANDUM

OMA BAKER, ET AL, DEFENDANTS.

This case comes before the Court on remand from the Sixth Circuit Court of Appeals vacating this Court's Order of July 3, 1985, directing that the deed conveying real property to third party defendants Homer Baker and John V. Jones be set aside and the property partitioned or sold. The Sixth Circuit has instructed the Court to make a finding of fact as to whether Homer Baker and John V. Jones were bona fide purchasers without notice of impairment of title. Accordingly, the Court makes the following additional findings of fact and conclusions of law.

Findings of Fact

Albert Baker died in 1972. His will named his daughter Zelma Pierce (now Reidling) as executrix of his estate, and gave her the power to sell all of his estate except the homestead. In L974 Zelma filed a Complaint in this Court seeking partition of sale of all the real property in her father's estate, including the homestead. On Jun3 11, 1976, Zelma's deposition was taken at her atorney's office, during which her complaint for sale of all the land was thoroughly and specifically discussed. Her brother Homer Baker was present at the deposition and thus had actual knowledge that the land was the subject of litigation. On June 15, 1979, one month before the Magistrate heard the case, Zelma sold all of the land except the homestead to Homer Baker and John Jones. John Jones knew "some kind of suit" was in

progress, but did not know it involved the property he was buying. Baker and Jones did not buy the land as a profit making venture.

Conclusions of Law

The Sixth Circuit held in this case:

> [I]f the grantees are bona fide purchasers without notice of any impairment of the power of sale, the deed was effective to pass title to the property. If, however, the grantees were not acting in good faith, or had actual or constructive notice that the property was the subject of litigation, the transaction may be set aside. —

Accordingly, the sale of one-half (½) undivided interest in Tracts 3-8 (as described in this Court's Order of October 3, 1985) of Albert Baker's estate to Homer Baker on June 15, 1978, is set aside, as Homer Baker knew the property was the subject of litigation. The sale of one-half (½) undivided interest in Tracts 3-8 of Albert Baker's estate to

John Jones on June 15, 1979, is effective, as Jones had no knowledge of any impairment to the title. Defendant Oma Baker contends that Jones should be charged with constructive knowledge of the lawsuit under a theory of joint adventure. See O'Bryan v. Bickett, 419 S.W.2d 726 (Ky. 1967). However, this theory is not applicable, as Baker and Jones did not purchase the land as a profit making venture.

This 10th day of december, 1987.

/s/ Eugne E. Siler, Jr.
EUGENE E. SILER, JR.
Chief Judge

NO. 88-5151

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ZELMA PIERCE (Reidling), Esecutrix of the Estate of Albert Baker, deceased; heir-at-law of Albert Baker, deceased; and her husband, MARION PIERCE,

Plaintiffs-Appellees,

v.

OMA BAKER, a widow; OVA BAKER; ROSIE BAKER; THELMA HIBBS; EVA GREER; JEAN CARLISLE; NORMAN CARLISLE; RAY BAKER; JACKIE BAKER; BARBARA BAXTER; JAMES H. BAXTER, heirs-at-law of Albert Baker, deceased,

Defendants-Appellants

v.

HOMER BAKER and LOTTIE RUTH BAKER,

Third-Party Defendants-Appellants.

/

On Appeal from the United States District Court for the Eastern District of Kentucky

BEFORE: MERITT and GUY, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM. This case, involving the property of a transfer of land from an estate's executrix to four grantees, is before this court for a second time. Previously, we remanded the case to the district court for a determination of whether the grantees, Homer and Lottie Ruth Baker, and John and Iva Jones, were bona fide purchasers, without notice of restrictions on Zelma Pierce's power to convey, when they purchased land from her in 1979. Disagreeing with the district court's conclusion that he had knowledge of pending litigation and was thus not a bona fide purchaser, Homer Baker appeals to this court again. We affirm the decision of the district court.

I

The facts and history of this case are long and complicated. Albert Baker died testate in Madison County, Kentucky, on November 29, 1972. Zelma Pierce (now

Reidling), Albert's daughter, was appointed executrix of her father's estate. The will included a grant of power to the executrix to sell any real estate included within the probate estate except for the homestead. In 1974, Zelma Pierce filed a complaint in the United States District Court for the Eastern District of Kentucky seeking partition or sale of all of the real property. Named as defendants were Oma Baker, Albert's widow, and the heirs of Albert Baker, excluding Homer Baker. Homer Baker was not named in the complaint because he had purportedly conveyed all of his interest in the real estate to two of his sisters, one of whom was Zelma Pierce. The complaint requested the court to order the sale of the real estate owned by Albert Baker at the time of his death and to distribute the proceeds.

The case was tried before a United States magistrate on July 25, 1979. Following the trial, the magistrate issued a report

and recommendation to the effect that the property be sold after a determination of its divisibility. The district court adopted the findings of the magistrate which also adjudged the interests of the parties, and remanded the case to the magistrate for a plan of sale. A hearing was held on February 24, 1981, to determine the divisibility of the property and a plan of sale. At that hearing, all parties stipulated that the property could not be divided without materially affecting the value.

At that time, plaintiff Zelma Pierce, executrix, through her attorney, revealed to the court that she had sold tracts 3-8, a major portion of the real estate that was the subject of this lawsuit, to her brother, Homer Baker and his wife, and to John V. Jones and Iva J. Jones. Zelma Pierce sold the land for $36,630.00 by deed dated June 15, 1979. Subsequently

it was also discovered that the Bakers and Joneses entered into a coal lease with Shamrock Coal Company. The lease provided for royalty payments at the rate of $1.00 per ton of coal removed with minimum royalty payments of $12,000 per year for a period of five years. It was estimated by a representative of Shamrock that there were over one million tons of recoverable coal on the property.

On March 12, 1981, Zelma Pierce, as executrix, filed a pleading entitled "Withdrawal of Portion of Complaint," stating that she was withdrawing that portion of her complaint which requested the court to sell the property described in the complaint as tracts 3-8. Defendant heirs, Oma Baker, Eva Greer and Fred Greer, and Fred Baker, filed an objection to plaintiff's "Withdrawal of Portion of Complaint" and moved that the deed from Zelma Pierce to the Bakers and Jones be declared null and void.

After a hearing conducted on April 29, 1982, the magistrate recommended the following:

1) that plaintiff's "Withdrawal of Portion of Complaint" be treated as either a motion to amend the complaint under Fed. R. Civ. P. 15(a) or as a motion to dismiss under Fed. R. Civ. P. 41(a), adn that in either case, the motion should be denied because it is untimely and prejudicial to defendants;

2) that the deed from Zelma Pierce to the Bakers and Joneses be held null and void;

3) that two independent appraisers be appointed to make appraisals of the property; and

4) that defendant Oma Baker be permitted to file a third-party complaint naming the Bakers and Jones (hereinafter grantees) as third-party defendants.

Subsequently, the grantees filed

a motion to alter, amend or vacate the court's adoption of the magistrate's recommendations. The district court rejected grantees' arguments, accepting the magistrate's conclusion that the deed from Zelma Pierce to Bakers and Joneses should be invalidated.

The grantees appealed that decision to this court, and we vacated and remanded to the district court for reconsideration. This court held that a breach of fiduciary duty by Zelma Pierce, as alleged by the defendant heirs, was not enough to invalidate the transfer to the grantees if the grantees were bona fide purchasers without knowledge of the executrix's breach. Additionally, we found that Zelma Pierce's filing of a suit seeking to sell all the land, and her delay of seven years before selling the non-homestead land, did not destroy her power of sale established by the will. Since the district court made no findings as to the nature of the grantees' purchase,

we remand for consideration this single issue.

> Accordingly, we hold that if the grantees are bona fide purchasers without notice of any impairment of the power of sale, the deed was effective to pass title to the property. If, however, the grantees were not acting in good faith, or had actual or constructive notice that the property was the subject of litigation, the transaction may be set aside.

Baker v. Pierce, No. 85-5700, slip op. at 9 (6th Cir. 1987) (unpublished).

II.

The Bakers now appeal the district court's determination that, at the time of the 1979 purchase from the executrix, Homer Baker had actual knowledge that the land he had bought was the subject of litigation between Zelma Pierce and the other heirs of Albert Baker. In support of his point on appeal, Homer Baker points to several factors demonstrating his lack of knowledge: his sworn affidavit and deposition testimony, both suggesting he

did not learn that the litigation involved his property until 1983; the affidavit and testimony of Jones, who testified to his own lack of knowledge, thereby inferring that Baker must not have known, or he would have told his co-owner; the apparent belief of Zelma Pierce and her counsel, in 1979, that nothing stood in the way of Baker's purchase; the failure of all parties to file a notice of lis pendens; and Baker's sworn testimony that he did not learn that all testated property was involved in the 1976 action when he attended a deposition with Zelma Pierce in 1976.

Despite this evidence, we affirm the district court's determination. A party, such as Baker, requesting a court of appeals to overturn a factual finding made a by a district court has a heavy burden to shoulder. We will reject a district court's factual finding only when that finding is clearly erroneous. Fed. R.

Civ. P. 52.[1]

> "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

---

[1]Baker erroneously believes that the district court's factual finding is somehow entitled to less deference where, as here, it is based solely on sworn testimony and not upon any credibility determinations resulting from the viewing of witness testimony. While Rule 52 does recognize a deference to be granted trial judge credibility determinations, the factfinder is not entitled to any less deference where his factual determinations are based only upon sworn testimony.

> Where there are two permissible views of evidence, the fact-finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949) . . . .
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. . . .

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted).

Given the evidence before the district court, we cannot say that its conclusion was clearly erroneous. The district court based its decision upon the fact that Homer Baker was present when Zelma Pierce gave her deposition statements in 1976, in connection with her 1976 action to sell all of the property. While Baker accurately notes that nothing in the deposition explicitly states that the suit involved all property and not just the homestead, the deposition did refer to eight tracts, many more than relate to just the homestead (Baker and

Jones bought tracts 3-8 of these eights tracts). Further, during the deposition, the executrix was asked about the effect on the land's value caused by the leasing out of mineral rights--rights that were leased for mineraly under the land later purchased by Homer Baker, not under the homestead. Finally, in making sure all the tracts were correctly labeled and accounted for, the executrix agreed that tract No. 6 was one that had been conveyed by Homer Baker to Albert Baker in 1946. Upon hearing a discussion relating to this tract, Homer Baker, having himself once owned this particular tract before conveying it to his father, seemingly would have known that Zelma Pierce could not be discussing solely the homestead property. There was ample discussion at the 1976 deposition of Zelma Pierce to justify the district court's conclusion that Homer Baker actually knew that tracts 3-8 were a subject of

the suit. Accordingly, the judgment of the district court is AFFIRMED.[2]

---

[2]We note, but do not address, the fact that the order of sale does not indicate if Homer Baker is to be reimbursed for his portion of the original purchase price, nor whether Homer Baker is to make any accounting of the rents and royalties received during his period of ownership.

CASE NO. 88-5151

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ZELMA PIERCE, ET AL, Plaintiffs-Appellees, vs. HOMER BAKER, ET AL, Defendants-Appellants.	)	O R D E R

BEFORE: MERRITT and GUY, Circuit Judges;
EDWARDS, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant, the court conludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

88-5151

HOMER BAKER AND LOTTIE RUTH
BAKER, HUSBAND AND WIFE, APPELLANTS,

VS. PETITION FOR REHEARING/RECONSIDERATION

ZELMA PIERCE, EXECUTRIX OF
THE ESTATE OF ALBERT BAKER,
ET AL, APPELLEES.

COMES NOW the Appellants, Homer Baker and Lottie Ruth Baker, by counsel, and Petition this Honorable Court for a Rehearing/Reconsideration of the Appeal involved herein from the Opinion and Order affirming the District Court, dated and filed December 28, 1988, upon the following grounds:

> The Court of Appeals, Sixth Circuit stated that they would reject a District Court's factual finding only when the finding is clearly erroneous. Fed. R. Civ. P. 52.

and quoted the following:

> "[A] Findings is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the defeinate and firm conviction that a mistake had been committed" United STates V. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court....If the District Court's account of the evidence is plausible in the light of the record viewed in its entirely, the Court of Appeals may not reverse it even though convinced that had it been setting as teh trier of fact, it would have weighed the evidence differently. Where there are two permissable views of the evidence, the fact finder's choice between them cannot be clearly erroneous. United States V. Yellow Cab Co., 338 U.S. 338, 342 (1949)...."

The Sixth Circuit went on to state:

This is so even when the District Court's findings do not rest on credibility

determinations, but are based instead on physical or documentary evidence or inferrences from other facts....

Anderson V. Bessemer City, 470 U.S. 564, 573-74 (1985).

The Sixth Circuit in its Opinion of December 28, 1988, stated:

> "Given the evidence before the District Court, we cannot say that its conclusion was clearly erroneous."

The Sixth Circuit went on to state, in the above referenced Opinion, that the District Court based its decision upon teh fact that Homer Baker was present when Zelma Pierce gave her deposition statements in 1976. But noted that while Baker accurately notes that nothing in the deposition explicitly states that the suit involved all property and not just the home place, the deposition did refer to eight (8) tracts, many more than relate to just the homestead. The Sixth

Circuit further noted that during this deposition, the Executrix was asked about the effect on the land values caused by the leasing out of mineral rights -- rights that were leased for minerals under the land later purchased by Homer Baker, not under the homestead and the Executrix agreed that tract number six (6) was one that had been conveyed by Homer Baker to Albert Baker in 1946. That upon hearing a discussion related to this tract, Homer Baker, having himself once owned this particular tract before conveying it to his father, seemingly would have known that Zelma Pierce could not be discussing solely the homestead property. The Sixth Circuit further concluded that there was ample discussion at the 1976 deposition of Zelma Pierce to justify the District Court's conclusion that Homer Baker actually knew that tracts 3-8 were the subject of the suit. Accordingly the Sixth Circuit

affirmed the Judgment of the District Court.

INTRODUCTION

This is the second appeal to the Sixth Circuit. This case was appealed the first time due to the fact that the trial judge had ruled that the deed to the Appellants, Homer Baker and John V. Jones was void. The Sixth Circuit, on January 27, 1987, on the first appeal held as follows:

> "If the grantees (Baker and Jones) are bona fide purchasers without notice of any impairment of the power of sale, the deed was effective to pass title to the property. If, however, the grantees (Baker and Jones) were not acting in good faith, or had actual or constructive notice that the property was the subject of litigation, the transaction may be setaside. Alternatively, if the transaction between Plaintiff (Executrix) and the grantees (Baker and Jones) was fraudulent as to the Defendants (other Defendant) the transaction is void. The Judgment of the District Court was vacated and the case remanded because there had been no finding as to whether the grantees (Baker

and Jones) were bona fide purchasers without notice."

On December 10, 1987, the District Court ordered the one-half (½) undivided interest of Appellant, Homer Baker, be sold, as Homer Baker knew the property was the subject of litigation. The Court went on to state that the one-half (½) undivided interest of Jonn V. Jones would not be sold in that John V. Jones has no knowledge of any impairment to the title.

From the above December 10, 1987, Order and Judgment of the District Court, Homer Baker and Lottie Ruth Baker, husband and wife, initiated this Appeal to the Sixth Circuit.

Briefs were filed on behalf of the Appellants, Homer Baker and Lottie Ruth Baker, and a brief was filed on behalf of the Appellee, Oma Baker, widow of Albert Baker, deceased, who had previously renounced

the will of Albert Baker, deceased.

On Appeal, the Appellants, Homer Baker and Lottie Ruth Baker, point to several factors demonstrating the lack of knowledge that the property was subject to litigation when Homer Baker purchased the property along with John V. Jones in 1979 and they are setforth as follows:

(1) The Affidavit and deposition of Homer Baker, both suggesting that Homer Baker did not learn that the litigation involved his property until 1983;

(2) The Affidavit and testimony of John V. Jones who testified to his own lack of knowledge thereby inferring that Baker must not have known, or he would have told his co-owner;

(3) The apparent belief of Zelma Pierce and her counsel in 1979, that nothing stood in the way of Baker's purchase.

(4) The failure of all parties to file a Notice of Lis Pendens; and

(5) Baker's sworn testimony that he did not learn that all testated property was involved in the 1976 action when he attended a depostion of Zelma Pierce in 1976.

The Sixth Circuit, in its December 28, 1988, Decision to affirm the District Court stated despite the above evidence, we affirm the District Court's determination, also, evidentally, relying upon the 1976 deposition of Zelma Pierce, when the Sixth Circuit stated, in making sure all the tracts were correctly labled and accounted for, the Executrix agreed that tract number six (6) was one that had been conveyed by Homer Baker to Albert Baker in 1956. Upon hearing discussion relating to this tract, Homer Baker, having himself once owned this particular tract before conveying it to his father, seemingly would have known that Zelma Pierce could not have been discussing solely the homestead property.

POSITION OF APPELLANTS

(1) The Sixth Circuit, after reviewing the record, and all the evidence and filed in their December 28, 1988, Opinion and Judgment that the Appellant, Homer Baker, had once owned tract number six (6) and had transferred it to his father, Albert Baker, in 1946, has completely misinterpreted the 1976 deposition in that Homer Baker is not the same Homer Baker that transferred the property in question to Albert Baker in 1946.

(2) The Appellant, Homer Baker, was only ten (10) years old in 1946, and did not turn eleven (11) years of age until August of 1946, and the evidence given in the 1976 deposition of Zelma Pierce showed that the property was transferred in April of 1946 which would make Homer Baker ten (10) years of age in that Homer, the Appellant herein, was born on August 28, 1935.

(3) That Albert Baker, deceased, was the father of this Appellant, Homer Baker, and the Homer Baker that transferred the property in 1946 was an uncle of Homer Baker, the Appellant herein, and the brother to Albert Baker, deceased.

(4) That under Kentucky law a person under the age of twenty one (21) could not transfer property in 1946 and now we believe that the transfer age is eighteen (18) and therefore Homer Baker, the Appellant herein, could not have transferred this property to his father in 1946.

STATEMENT OF THE CASE

Albert Baker, deceased, died testate, owning all the property that was the original subject of litigation on November 19, 1972, and his Last Will and Testament was probated and granted the Executrix, Zelma Pierce Reidling, the power to sell all of the property, but the homeplace.

Homer Baker, the Appellant herein, was one of the heirs of Albert Baker, deceased, and deeded his interest that he had inherited from his father, to his sister, Zelma Pierce Reidling, and his sister, Barbara Baxter, on September 24, 1974, through a Trustee in Bankruptcy, which eliminated this Appellant from any interest in the property that he had inherited.

Under the will, Zelma Pierce Reidling had the power to sell all of the property but the "homeplace" but, in 1974, she filed suit in the U.S. District Court for the Eastern District of Kentucky, at London, against all the named devisees, to have "all" of the property sold.

Albert Baker, deceased, did not owen the mineral rights under the property and the minerals were evidentally owned by Continental Coal Company, Inc., which has been uncontested throughout this matter.

On July 15, 1979, the Executrix

Zelma Pierce (Reidling) deeded the property involved in this Appeal to Homer Baker and John V. Jones by deed of General Warranty, which specifically excluded any warranty of title to the mineral rights under the property.

Homer Baker, the Appellant herein, and the Appellee, John V. Jones, were not brought into the suit until a Third Party Complaint was filed on November 5, 1983.

The Executrix, Zelma Pierce, gave her deposition for the first time on June 11, 1976, with the Appellant, Homer Baker, seated approximately thirty (30) feet from where the deposition was going on, but in the same room.

Homer Baker, the Appellant herein, testified by way of deposition on February 20, 1984, and, in essence, testifeid that he did not know the property that he and Jones had purchased in 1979 was the

subject of litigation, in 1979, but thought that the litigation concerned the "homeplace".

Baker further testified, or by way of Affidavit, that he knew that he had not purchased the mineral rights under the property but had learned sometime in 1980 or 1981 about surface rights.

The District Court setaside the deed to Baker and Jones and the matter was appealed to the Sixth Circuit which reversed the case and remanded it to the District Court for further findings with reference to whether Baker and Jones knew that the property was the subject of litigation in 1979, the date of the transfer of the property to Jones and Baker by the Executrix, Zelma Pierce Reidling.

After remand, the District Court setaside the one-half (½) undivided interest that was transferred to the Appellant Baker but, due to the fact that Jones did not know about the litigation, ruled

that Jones did not know about the litigation, ruled that Jones could retain his one-half (½) undivided interest.

This matter was then Appealed for the second time to the Sixth Circuit, who affirmed the District Court on December 28, 1988, and that ruling is what has initiated this Petition for Rehearing/ Reconsideration before the Sixth Circuit Court of Appeals.

ARGUMENT

It is the further position of the Appellants, Homer Baker and Lottie Ruth Baker, husband and wife, that the Judge of the U.S. District Court was clearly erroneous in that there is no evidence whatsoever to support the ruling of the District Court, which was based upon the 1976 deposition of Zelma Pierce Reidling, with the Appellant, Homer Baker, in the room.

A mistake has clearly been made by the District Judge and the Court of Appeals for the Sixth Circuit has had a chance to correct the mistake and the Appellants truly believe that the Sixth Circuit has misread or misconstrued the evidence given by Zelma Pierce Reidling in the 1976 deposition.

By the Opinion of the Sixth Circuit dated December 28, 1988, one would state that the Sixth Circuit truly believed that Homer Baker transferred tract number six (6) to Albert BAker in 1946 and truly believed that Homer BAker was the same Homer Baker this is the Appellant herein, which is completely erroneous as shown by the Affidavits attached hereto and made a part hereof in the Appendix of the following persons:

(1) Homer Baker, the Appellant;

(2) Lottie Ruth Baker, the Appellant and;

(3) Ann Baker.

There is also attached hereto, in the Appendix, a verification of birth, which shows that Homer Baker, the Appellant herein was born on August 28, 1935, and is now only fifty two (52) years of age and he would have only been ten (10) years old in April of 1946 and therefore the Sixth Circuit has errored in the assumption that the Appellant is the same Homer Baker of 1946.

There was not any discussion, much less ample discussion, at the 1976 deposition of Zelma Pierce to justify the District Court's conclusion that Homer Baker actually knew that tracts 3-8 were subject of the law suit. Homer Baker, the Appellant herein, has told the District Court, by way of deposition and Affidavits and has also told the Sixth Circuit, by way of testimony and Affidavit that he did not have any idea whatsoever that the property that he and John V. Jones

purchased in 1979 was the subject of litigation in 1979 when he had attended a brief deposition in 1976, some three (3) years earlier and there has not been one shread of evidence to dispute this fact and therefore the Judge of the District Court as well as the Judges of the Sixth Circuit have no other choice but to rule tha Homer Baker was a purchaser without knowledge that the property that he purchased in 1979 was the subject of litigation.

There is no proof whatsoever that even the grantor, Zelma Pierce Reidling even knew that the property involved herein was the subject of litigation when the property was transferred from her to Homer Baker and John V. Jones in 1979, as a matter of fact, reading the whole record herein, it clearly points to the fact that she did not even know the property was the subject of litigation.

There has been a clear mistake committed in this matter and the District Judge was clearly erroneous, but, if not, the Judge was at least erroneous in the finding that he made and now the Sixth Circuit has confirmed the error and under the case of United States V. United States Gypsum Co. cited by the Court of Appeals in their Opinion, if they cannot get around this case then said case should be overruled to correct all errors and find for the Appellants herein.

CONCLUSION

This matter should be reheard/ reconsidered by this Court of Appeals and the Opinion and Judgment of the Sixth Circuit dated December 28, 1988, should be cancelled, setaside and held for naught and this matter reversed with directions that the deed to the Appellants, Homer Baker and Lottie Ruth Baker be valid.

All of the law and the evidence in this matter supports such conclusion and the trial judge simply made a mistake or a clear error which should be over turned by this Court.

The Petition for Rehearing/ Reconsideration should be granted in that justice and equity require same.

(A copy of the December 28, 1988, Opinion of this Court is attached hereto in the Appendix.)

Respectfully submitted,

HON. JOE T. ROBERTS
405 South Main Street
P.O. Box 176
London, Kentucky 40741
TELEPHONE: (606) 878-6111
ATTORNEY FOR APPELLANTS

BY: /s/ Joe T. Roberts
JOE T. ROBERTS

CERTIFICATION

The undersigned hereby certifies that he has mailed two (2) true and correct copies of the foregoing to the following:

(1) Hon. Elmer Cunnagin
Cunnagin & Cunnagin
4th & Main Street
London, Kentucky 40741

(2) Clerk, U.S. District Court
Federal Building
Main Street
London, Kentucky 40741

All on this the 9th day of January, 1989.

/s/ Joe T. Roberts
JOE T. ROBERTS

APPENDIX

PAGE(S)

AFFIDAVIT OF HOMER BAKER..... 1 - 2

AFFIDAVIT OF LOTTIE RUTH BAKER..... 3 - 4

AFFIDVAIT OF ANN BAKER..... 5 - 6

VERIFICATION OF BIRTH
(OF HOMER BAKER)..... 7

DECEMBER 28, 1988, RULING OF
THE SIXTH CIRCUIT COURT
OF APPEALS..... 8 - 15

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

88-5151

HOMER BAKER AND LOTTIE RUTH BAKER, HUSBAND AND WIFE, APPELLANTS,

VS. AFFIDAVIT OF HOMER BAKER

ZELMA PIERCE, EXECUTRIX OF THE ESTATE OF ALBERT BAKER, DECEASED, ET AL, APPELLEES.

COMES NOW the Affiant, Homer Baker, and after being duly sworn, states as follows:

(1) That this Affiant is the same person that is the Appellant in the above styled matter and who is now moving for rehearing/reconsideration in the above styled matter.

(2) That this Affiant is married to the Appellant, Lottie Ruth Baker, and our marriage date is August 20, 1959, and we have lived together as man and wife since that date.

(3) That this Affiant, Homer Baker, was born August 28, 1935, and is now fifty three (53) years of age.

(4) That in 1946 this Affiant was only ten (10) years of age and did not turn eleven (11) until August of 1946.

(5) This Affiant, Homer Baker, never owned tract no. 6, nor did he transfer tract no. 6 to Albert Baker, his father in 1946 and therefore did not know tract no. 6 from any other tract of land and did not know or have any reference whatsoever made to tract no. 6, nor tracts 3-8 were the subject of a lawsuit in 1976 nor in 1979 at the time the deed was transferred from Zelma Pierce Reidling, Executrix, to Homer Baker and John V. Jones.

(6) That the only property that this Affiant, Homer Baker, knew was in the lawsuit was the "homeplace" and not any other tract of land whatsoever.

(7) That the Homer Baker mentioned in this law suit and also mentioned in the Decision rendered by the Court of Appeals for the Sixth Circuit on December 28, 1988, was this Affiant's uncle, and the brother of this Affiant's father, Albert Baker, both whom are deceased, with Homer Baker dying in the State of Michigan in 1959, at the age of sixty two (62) and the said Homer Baker, uncle of this Affiant, sold this property to Albert Baker, his brother in 1946, while living in Clay County, Kentucky, and then immediately moved to the State of Michigan where he lived until his death in 1959.

FURTHER the Affiant sayeth not.

/s/ Homer Baker
AFFIANT, HOMER BAKER

STATE OF KENTUCKY
SCT:
COUNTY OF LAUREL

Acknowledged, subscribed and sworn to before me by Homer Baker, Affiant herein, on this the 5th day of January, 1989, to be true.

/s/ Cheri Philpot
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:

8/25/90

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

88-5151

HOMER BAKER AND LOTTIE RUTH BAKER, HUSBAND AND WIFE, APPELLANTS,

VS. AFFIDAVIT OF LOTTIE RUTH BAKER

ZELMA PIERCE, EXECUTRIX OF THE ESTATE OF ALBERT BAKER, DECEASED, ET AL, APPELLEES.

COMES NOW the Affiant, Lottie Ruth Baker, and after being duly sworn, states as follows:

(1) That this Affiant is the same person that is one of the Appellants in the above styled matter.

(2) That this Affiant is married to the Appellant, Homer Baker and was married on August 20, 1959, and the parties have lived together since that time.

(3) The Appellant, Homer Baker, was born on August 28, 1935, and is now fifty three (53) years of age.

(4) That due to the birthdate of the Appellant, Homer Baker, he would have only been ten (10) years old in 1946 and would not have turned eleven (11) until August 28, 1946.

(5) That Homer Baker never discussed the property that he and John Jones purchased in 1979 from the Executrix, Zelma Pierce Reidling, until the purchase and never indicated to this Affiant in any way whatsoever that he knew the property was in litigation.

(6) This Affiant did not know that the property purchased by her husband, Homer, was involved in litigation until sometim in 1983 or 1984, at the time the Appellant, Homer Baker, was served with Summons.

FURTHER the Affiant sayeth not.

/s/ Lottie Ruth Baker
AFFIANT, LOTTIE RUTH BAKER

STATE OF KENTUCKY
SCT:
COUNTY OF LAUREL

Acknowledged, subscribed and sworn to before me by Lottie Ruth Baker, Affiant herein, on this the 5th day of January, 1989, to be true.

/s/ Cheri Philpot
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:

8/25/90

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

88-5151

HOMER BAKER AND LOTTIE RUTH BAKER, HUSBAND AND WIFE, APPELLANTS,

VS. AFFIDAVIT OF ANN BAKER

ZELMA PIERCE, EXECUTRIX OF THE ESTATE OF ALBERT BAKER, DECEASED, ET AL, APPELLEES.

COMES NOW the Affiant, Ann Baker, and after being duly sworn, states as follows:

(1) That this Affiant, Ann Baker, is the former spouse of Esco Baker, who is the brother of Homer Baker, deceased, and Albert Baker, deceased.

(2) That Albert Baker, deceased, was the father of Homer Baker, the Appellant herein.

(3) That Esco Baker is an uncle of Homer Baker, the Appellant herein.

(4) That Homer Baker, deceased, was the uncle of Homer Baker, the Appellant

herein.

(5) That in 1946 Homer Baker, deceased, the brother in law of this Affiant, sold real estate in Clay County to his brother, Albert Baker, deceased, and moved to the State of Michigan, where the said Homer Baker died in 1959 at the age of sixty two (62).

(6) That in April of 1946 the Appellant herein, Homer Baker, was only ten (10) years of age.

FURTHER the Affiant sayeth not.

/s/ Ann Baker
AFFIANT, ANN BAKER

STATE OF KENTUCKY
SCT:
COUNTY OF MADISON

Acknowledged, subscribed and sworn to before me by Ann Baker, Affiant herein, on this the 6th day of January, 1989, to be true.

/s/ Christine M. Dalton
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:

2/24/90

VERIFICATION OF BIRTH

Homer Baker
(Name)

was born on 3/28/35
(Date)

in Clay County, Kentucky

to Viola Jordan
(Maiden name of mother)

according to records on file in the health department of this county.

Date: 2/16/58 Signed: Elizabeth Smith
Local Registrar or Deputy Local Registrar

State File No. (if available) 45750

Kentucky State Department of Health Form VS 10

NO. 88-5151

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ZELMA PIERCE (Reidling), Esecutrix of the Estate of Albert Baker, deceased; heir-at-law of Albert Baker, deceased; and her husband, MARION PIERCE,

Plaintiffs-Appellees,

v.

OMA BAKER, a widow; OVA BAKER; ROSIE BAKER; THELMA HIBBS; EVA GREER; JEAN CARLISLE; NORMAN CARLISLE; RAY BAKER; JACKIE BAKER; BARBARA BAXTER; JAMES H. BAXTER, heirs-at-law of Albert Baker, deceased,

Defendants-Appellants

v.

HOMER BAKER and LOTTIE RUTH BAKER,

Third-Party Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Kentucky

_____/

BEFORE: MERITT and GUY, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM. This case, involving the property of a transfer of land from an estate's executrix to four grantees, is before this court for a second time. Previously, we remanded the case to the district court for a determination of whether the grantees, Homer and Lottie Ruth Baker, and John and Iva Jones, were bona fide purchasers, without notice of restrictions on Zelma Pierce's power to convey, when they purchased land from her in 1979. Disagreeing with the district court's conclusion that he had knowledge of pending litigation and was thus not a bona fide purchaser, Homer Baker appeals to this court again. We affirm the decision of the district court.

I

The facts and history of this case are long and complicated. Albert Baker died testate in Madison County, Kentucky, on November 29, 1972. Zelma Pierce (now

Reidling), Albert's daughter, was appointed executrix of her father's estate. The will included a grant of power to the executrix to sell any real estate included within the probate estate except for the homestead. In 1974, Zelma Pierce filed a complaint in the United States District Court for the Eastern District of Kentucky seeking partition or sale of all of the real property. Named as defendants were Oma Baker, Albert's widow, and the heirs of Albert Baker, excluding Homer Baker. Homer Baker was not named in the complaint because he had purportedly conveyed all of his interest in the real estate to two of his sisters, one of whom was Zelma Pierce. The complaint requested the court to order the sale of the real estate owned by Albert Baker at the time of his death and to distribute the proceeds.

The case was tried before a United States magistrate on July 25, 1979. Following the trial, the magistrate issued a report

and recommendation to the effect that the property be sold after a determination of its divisibility. The district court adopted the findings of the magistrate which also adjudged the interests of the parties, and remanded the case to the magistrate for a plan of sale. A hearing was held on February 24, 1981, to determine the divisibility of the property and a plan of sale. At that hearing, all parties stipulated that the property could not be divided without materially affecting the value.

At that time, plaintiff Zelma Pierce, executrix, through her attorney, revealed to the court that she had sold tracts 3-8, a major portion of the real estate that was the subject of this lawsuit, to her brother, Homer Baker and his wife, and to John V. Jones and Iva J. Jones. Zelma Pierce sold the land for $36,630.00 by deed dated June 15, 1979. Subsequently

it was also discovered that the Bakers and Joneses entered into a coal lease with Shamrock Coal Company. The lease provided for royalty payments at the rate of $1.00 per ton of coal removed with minimum royalty payments of $12,000 per year for a period of five years. It was estimated by a representative of Shamrock that there were over one million tons of recoverable coal on the property.

On March 12, 1981, Zelma Pierce, as executrix, filed a pleading entitled "Withdrawal of Portion of Complaint," stating that she was withdrawing that portion of her complaint which requested the court to sell the property described in the complaint as tracts 3-8. Defendant heirs, Oma Baker, Eva Greer and Fred Greer, and Fred Baker, filed an objection to plaintiff's "Withdrawal of Portion of Complaint" and moved that the deed from Zelma Pierce to the Bakers and Jones be declared null and void.

After a hearing conducted on April 29, 1982, the magistrate recommended the following:

1) that plaintiff's "Withdrawal of Portion of Complaint" be treated as either a motion to amend the complaint under Fed. R. Civ. P. 15(a) or as a motion to dismiss under Fed. R. Civ. P. 41(a), adn that in either case, the motion should be denied because it is untimely and prejudicial to defendants;

2) that the deed from Zelma Pierce to the Bakers and Joneses be held null and void;

3) that two independent appraisers be appointed to make appraisals of the property; and

4) that defendant Oma Baker be permitted to file a third-party complaint naming the Bakers and Jones (hereinafter grantees) as third-party defendants.

Subsequently, the grantees filed

a motion to alter, amend or vacate the court's adoption of the magistrate's recommendations. The district court rejected grantees' arguments, accepting the magistrate's conclusion that the deed from Zelma Pierce to Bakers and Joneses should be invalidated.

The grantees appealed that decision to this court, and we vacated and remanded to the district court for reconsideration. This court held that a breach of fiduciary duty by Zelma Pierce, as alleged by the defendant heirs, was not enough to invalidate the transfer to the grantees if the grantees were bona fide purchasers without knowledge of the executrix's breach. Additionally, we found that Zelma Pierce's filing of a suit seeking to sell all the land, and her delay of seven years before selling the non-homestead land, did not destroy her power of sale established by the will. Since the district court made no findings as to the nature of the grantees' purchase,

we remand for consideration this single issue.

> Accordingly, we hold that if the grantees are bona fide purchasers without notice of any impairment of the power of sale, the deed was effective to pass title to the property. If, however, the grantees were not acting in good faith, or had actual or constructive notice that the property was the subject of litigation, the transaction may be set aside.

Baker v. Pierce, No. 85-5700, slip op. at 9 (6th Cir. 1987) (unpublished).

II.

The Bakers now appeal the district court's determination that, at the time of the 1979 purchase from the executrix, Homer Baker had actual knowledge that the land he had bought was the subject of litigation between Zelma Pierce and the other heirs of Albert Baker. In support of his point on appeal, Homer Baker points to several factors demonstrating his lack of knowledge: his sworn affidavit and deposition testimony, both suggesting he

did not learn that the litigation involved his property until 1983; the affidavit and testimony of Jones, who testified to his own lack of knowledge, thereby inferring that Baker must not have known, or he would have told his co-owner; the apparent belief of Zelma Pierce and her counsel, in 1979, that nothing stood in the way of Baker's purchase; the failure of all parties to file a notice of lis pendens; and Baker's sworn testimony that he did not learn that all testated property was involved in the 1976 action when he attended a deposition with Zelma Pierce in 1976.

Despite this evidence, we affirm the district court's determination. A party, such as Baker, requesting a court of appeals to overturn a factual finding made a by a district court has a heavy burden to shoulder. We will reject a district court's factual finding only when that finding is clearly erroneous. Fed. R.

Civ. P. 52.[1]

> "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

---

[1]Baker erroneously believes that the district court's factual finding is somehow entitled to less deference where, as here, it is based solely on sworn testimony and not upon any credibility determinations resulting from the viewing of witness testimony. While Rule 52 does recognize a deference to be granted trial judge credibility determinations, the factfinder is not entitled to any less deference where his factual determinations are based only upon sworn testimony.

> Where there are two permissible views of evidence, the fact-finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949) . . . .
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. . . .

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted).

Given the evidence before the district court, we cannot say that its conclusion was clearly erroneous. The district court based its decision upon the fact that Homer Baker was present when Zelma Pierce gave her deposition statements in 1976, in connection with her 1976 action to sell all of the property. While Baker accurately notes that nothing in the deposition explicitly states that the suit involved all property and not just the homestead, the deposition did refer to eight tracts, many more than relate to just the homestead (Baker and

Jones bought tracts 3-8 of these eights tracts). Further, during the deposition, the executrix was asked about the effect on the land's value caused by the leasing out of mineral rights--rights that were leased for mineraly under the land later purchased by Homer Baker, not under the homestead. Finally, in making sure all the tracts were correctly labeled and accounted for, the executrix agreed that tract No. 6 was one that had been conveyed by Homer Baker to Albert Baker in 1946. Upon hearing a discussion relating to this tract, Homer Baker, having himself once owned this particular tract before conveying it to his father, seemingly would have known that Zelma Pierce could not be discussing solely the homestead property. There was ample discussion at the 1976 deposition of Zelma Pierce to justify the district court's conclusion that Homer Baker actually knew that tracts 3-8 were a subject of

the suit. Accordingly, the judgment of the district court is AFFIRMED.[2]

---

[2]We note, but do not address, the fact that the order of sale does not indicate if Homer Baker is to be reimbursed for his portion of the original purchase price, nor whether Homer Baker is to make any accounting of the rents and royalties received during his period of ownership.